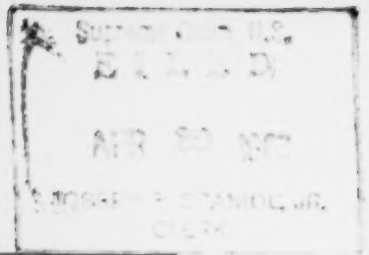


86 1678

NO. _____



IN THE
Supreme Court Of The United States

October Term, 1986

HAROLD LEE MORRIS,

Petitioner

vs.

JOHN W. GARMON,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

Charles Karr
MARTIN, VATER & KARR
Attorneys at Law
505 First National Bank Bldg.
Fort Smith, Arkansas 72901
Telephone: (501) 782-4028

Attorney for Petitioner

30117

QUESTION PRESENTED FOR REVIEW

Whether state courts may use judicially created procedural rules and doctrines, such as “constitutional arguments not presented to the trial court cannot be raised on appeal” and “the law of the case”, to deny full faith and credit to judgments of sister states.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTION	1
REPORTS OF OPINIONS BELOW	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	10
APPENDIX	
A	A-1
B	A-8

TABLE OF AUTHORITIES

CASE CITATIONS

	Page
<i>Durfee vs. Duke</i> , 375 U. S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963)	14
<i>Johnson vs. Muelberger</i> , 340 U. S. 584, 95 L.Ed. 552, 71 S.Ct. 474 (1951)	14
<i>Morris vs. Garmon</i> , 285 Ark. 259, 686 S.W.2d 396 (1985)	APPENDIX A
<i>Morris vs. Garmon</i> , 291 Ark. 67, 722 S.W.2d 571 (1987)	Appendix B
<i>Potter vs. Easley</i> , 288 Ark. 133, 703 S.W.2d 442 (1986)	15
<i>Smith vs. Smith</i> , 56 Haw. 295, 535 P.2d 1109 (1975)	11
<i>State Ex Rel Attorney General vs. Wright</i> , 194 Ark. 652, 109 S.W.2d 123 (1937)	11
CONSTITUTIONAL PROVISIONS	
Article 4, Section 1, United States Constitution	2



NO. _____

IN THE
Supreme Court Of The United States

October Term, 1986

HAROLD LEE MORRIS,

Petitioner

vs.

JOHN W. GARMON,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

JURISDICTION

Judgment of the Arkansas Supreme Court was entered on January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

REPORTS OF OPINIONS BELOW

The opinions of the Arkansas Supreme Court are *Morris Vs. Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985) and *Morris vs. Garmon*, 291 Ark. 67, 722 S.W.2d 571 (1987). They are set forth in Appendix A and B to the Petition.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Article 4, Section 1 Provides:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such act, records and proceedings shall be proved, and the effect thereof.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari follows two appeals to the Arkansas Supreme Court. An issue argued on both appeals was that the Arkansas Probate Court failed to give full faith and credit to an Order of the Texas Probate Court. On the first appeal the Arkansas Supreme

Court held that Petitioner failed to present the constitutional argument to the trial court and cannot raise it for the first time on appeal. In the second appeal, the Arkansas Supreme Court held that even though the argument was presented in the trial court the decision on the first appeal was the law of the case and was conclusive of every question of law or fact decided in the former appeal which were or might have been presented.

Alren I. Morrison and her husband, who predeceased her, lived for many years in Fort Smith, Arkansas. In 1979, after Mrs. Morrison fell and broke her hip, she was moved to a nursing home in Norman, Oklahoma near where her adopted daughter, Andrea Garmon, lived with her husband, John Garmon, and their two daughters. Mrs. Garmon died a short time after Mrs. Morrison was moved to the nursing home in Oklahoma. Shortly after Mrs. Garmon's death, upon petition of Mr. Garmon, he was appointed conservator of Mrs. Morrison's estate by the District Court of Cleveland County, Oklahoma. On the same day Mrs. Morrison executed a Will whereby she left her entire estate to Mr. Garmon. About six weeks later the Oklahoma Court entered an Order relieving Mr. Garmon of his duties as conservator of the estate and appointed The Security National Bank of

Norman as successor conservator.

In November, 1979, after Mrs. Garmon's death, Mrs. Morrison's brother, Harold Lee Morris, had Mrs. Morrison transferred by ambulance from the nursing home in Oklahoma to a nursing home in Fort Worth, Texas, near where he lived. She remained in the nursing home in Texas until her death on August 4, 1983.

On November 23, 1979, Mrs. Morrison executed her Last Will and Testament in Fort Worth, Texas. By her Will she gave all of her estate to her brother, Mr. Morris, and nominated him to serve as independent executor without bond.

On August 10, 1983 Mr. Morris filed in the Probate Court of Tarrant County, Texas, an Application for Probate of Will and Letters Testamentary. On November 28, 1983 the Probate Court of Tarrant County, Texas entered an Order admitting Mrs. Morrison's Will executed in Fort Worth, on November 23, 1979 to probate and Letters Testamentary were issued to Mr. Morris.

On August 17, 1983, Mr. Garmon filed in the District Court of Cleveland County, Oklaho-

ma, a Petition for Probate of Mrs. Morrison's Will executed in Oklahoma, and requested that Letters Testamentary be issued to him.

On or about December 16, 1983, Mr. Morris filed in the District Court of Cleveland County, Oklahoma, an Objection to the Petition for the Probate of Will which had been filed by Mr. Garmon. Attached to the Objection were copies of the Application for Probate of Will and Letters Testamentary filed in the Tarrant County, Texas, Probate Court, the Last Will and Testament Mrs. Morrison executed in Forth Worth, Texas, Order admitting Will to Probate, and authorizing issuance of Letters Testamentary entered by the Tarrant County Probate Court on November 28, 1983, and the Letters Testamentary issued to Mr. Morris.

On December 19, 1983, Mr. Garmon dismissed without prejudice the Petition for Probate of Mrs. Morrison's Will executed in Oklahoma he had filed in the District Court of Cleveland County, Oklahoma. On the same date, Mr. Garmon filed in the District Court of Cleveland County, Oklahoma, in the conservatorship proceeding a Motion to Stay Disbursement of Conservatorship Assets. In the Motion Mr. Garmon specifically alleged that Mrs. Morrison's domicile was Fort Smith at the time

of her death; that the Order of the Tarrant County, Texas Probate Court was not entitled to full faith and credit under the laws of the State of Oklahoma since the decedent was not a legal domiciliary of the State of Texas at the time of her death; that an Arkansas Court was the proper court to determine Mrs. Morrison's legal domicile; and that the Tarrant County Probate Court was without jurisdiction of the assets held by the conservator since the validity and interpretation of wills as to personal property of Mrs. Morrison was to be governed by the laws of her domicile. In the Motion Mr. Garmon requested an order prohibiting the conservator from disbursing any assets of the conservatorship estate until it received an order from a court of competent jurisdiction which could be afforded full faith and credit under the laws of the State of Oklahoma. On February 15, 1984, following a hearing on February 10, 1984, the District Court of Cleveland County, Oklahoma, entered an Order overruling Mr. Garmon's Motion to Stay Disbursement. Subsequent to that Order entered by the Oklahoma Court, before whom appeared both Mr. Morris and Mr. Garmon, the assets of Mrs. Morrison's estate held by the conservator were transferred to Mr. Morris as independent executor under the Will executed in Texas. On February 27, 1984, Mr. Morris filed in the Tarrant County Probate

Court an Inventory, Appraisement, and List of Claims. The inventory showed the certificate of deposit and shares of stock that were transferred to Mr. Morris by the conservator in Oklahoma.

On January 26, 1984, Mr. Garmon filed in the Probate Court of Sebastian County, Arkansas, a Petition For Appointment of Administrator of the Estate of Alren I. Morrison, Deceased. By this time Mr. Morris and Mr. Garmon had been or were parties in two separate proceedings in the District Court of Cleveland County, Oklahoma: one was for the probate of Mrs. Morrison's Will executed in Oklahoma and the other was the conservatorship. Both proceedings were initiated by Mr. Garmon. In addition to the two proceedings in Oklahoma, Mr. Garmon had notice of the proceeding in the Tarrant County Probate Court. Mr. Garmon had an attorney in Oklahoma as well as in Texas throughout this period of time.

In the Petition filed in the Sebastian County Probate Court, Mr. Garmon requested that Merchants National Bank of Fort Smith be appointed administrator of Mrs. Morrison's estate. Mr. Morris filed a Response to that Petition and pled the probate of the Will in Tarrant County, Texas. Subsequent thereto the parties filed additional pleadings and a hearing

was held on July 26, 1984. At the conclusion of the hearing the Sebastian County Arkansas Probate Court found that Mrs. Morrison was a domiciliary of the State of Arkansas and that her two granddaughters were pretermitted heirs who were entitled to the share of the Estate which would pass to them under the Arkansas Law of Descent and Distribution. The Sebastian County Probate Court admitted the Will executed in Texas to ancillary probate in Arkansas and appointed Merchants National Bank as ancillary administrator. The Sebastian County Probate Court ordered Mr. Morris to deliver immediately to the ancillary administrator all of the money and property of Mrs. Morrison which had come into his possession. Mr. Morris did as he was directed.

Mrs. Morrison's grandchildren are pretermitted heirs under Arkansas Law, Ark. Stat. Ann. 60-507 (b) (Repl. 1971), but are not pretermitted heirs under Texas law, V.A.T.S., Probate Code Section 67.

After the first appeal, and after the time for filing claims had expired, but before final distribution of the assets that had come to the ancillary administrator in Arkansas through the independent executor in Texas from the conservator in Oklahoma, Mr. Morris filed a Petition to

Transfer Residue of Assets to Independent Executor in Texas (transcript, pages 75-114). The Petition alleged that the Order of the Tarrant County Texas Probate Court was entitled to full faith and credit as to assets located outside of the State of Arkansas and that the Order of the Cleveland County Oklahoma District Court was res judicata as to all issues that were determined or which could have been determined as to assets located outside of the State of Arkansas. The Sebastian County Probate Court denied the Petition. The Arkansas Supreme Court then affirmed the Sebastian County Probate Court, relying on the doctrine of the law of the case. Mr. Morris now files this Petition for a Writ of Certiorari.

ARGUMENT

The real question presented for review is whether state courts may use judicially created doctrines, such as "the law of the case", to deny full faith and credit to judgments of sister states.

The Arkansas Supreme Court held on the first appeal that Petitioner had not presented his constitutional argument to the trial court. Petitioner does not agree with this finding. It is true that Petitioner did not mention the magic words, "full faith and credit", in his pleadings. Nonetheless, Petitioner's first pleading filed in the Arkansas trial court was a demand for notice of proceedings for appointment of personal representative. (first transcript, page 4) Copies of the Letters Testamentary, Last Will and Testament, and Order admitting the Will to probate from the Texas Probate Court were attached as exhibits to the demand. Next, Petitioner filed a Response of Personal Representative to Petition for Appointment of Domiciliary Administrator in Arkansas and attached thereto authenticated copies of the Last Will and Testament, Letters Testamentary, and Order admitting the Will to probate entered by the Texas Probate Court. (first transcript, pages 13—22) Furthermore, copies of the documents

from the Texas Probate Court as well as documents from the Oklahoma District Court were admitted into evidence at the hearing held in the case. All such documents were squarely before the trial court before the first appeal.

Arkansas had a case that was directly on point. The case of *State Ex Rel Attorney General vs. Wright*, 194 Ark. 652, 109 S.W.2d 123 (1937) was controlling. There an Arkansas domiciliary left a purported will bequeathing personalty consisting altogether of deposits in Texas bank, which were regarded as having a Texas situs. The will was duly probated in Texas. Then a proceeding was begun in Arkansas attacking the will as a forgery. The Arkansas Supreme Court held that the action could not be entertained, saying that the full faith and credit clause required that the Texas probate be respected.

Contrary to the Arkansas Supreme Court, the Hawaii Supreme Court held in *Smith v. Smith*, 56 Haw. 295, 535 P.2d 1109 (1975) that even though the appellant failed to properly raise the issue of full faith and credit on the record in the trial court, the Supreme Court could decide such issue, if it were necessary for the resolution of the case, because it would be of great constitutional and public importance and would

require no further facts for determination.

After the first appeal, and after the time for filing claims against the estate had expired, but before distribution of the assets, Petitioner filed in the Sebastian County Probate Court a verified Petition to Transfer Residue of Assets to Independent Executor in Texas. The Petition squarely faced before the Sebastian County Probate Court the issues of full faith and credit and res judicata of the orders from the Texas and Oklahoma courts as those orders affected assets located outside the state of Arkansas. (second transcript, pages 75—114) Attached as exhibits to the Petition were relevant pleadings and orders from the Texas and Oklahoma courts. The Sebastian County Probate Court denied the Petition and Petitioner took a second appeal to the Arkansas Supreme Court. The Arkansas Supreme Court held on the second appeal that the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented.

It is interesting to note that Respondent did not plead or argue in the trial court after the first appeal or in the Arkansas Supreme Court on the second appeal the doctrine of the law of the case.

The Arkansas Supreme Court held on the first appeal that arguments not presented in the trial court would not be considered on appeal. It did not follow its own ruling on this issue on the second appeal.

In examining Petitioner's argument here, it is helpful to see the issues that Respondent presented to the court in Oklahoma. In his Motion to Stay Disbursement of Conservatorship Assets (transcript, page 107), Respondent alleged:

1. At the time of her death Mrs. Morrison's domicile was Fort Smith, Arkansas.
2. Mr. Morris has caused to be entered the purported last will and testament of Mrs. Morrison into probate in the Probate Court of Tarrant County, Texas.
3. The Order of the Probate Court of Tarrant County, Texas is not entitled to full faith and credit under the laws of the State of Oklahoma since the decedent was not a legal domiciliary of the State of Texas at the time of her death.
4. The proper court to determine dece-

dent's legal domicile is the District Court of Sebastian County, Arkansas which has not adjudicated said issue.

5. Garmon fears the conservator will disburse the conservatorship assets to a court which was without proper jurisdiction over said assets since the validity and interpretation of will as to personal property of the decedent is governed by the laws of the testator's domicile.

The Oklahoma court overruled Respondent's Motion (second transcript, page 109) and Respondent took no appeal.

On the second appeal the Arkansas Supreme Court adhered to the rigid application of the doctrine of the rule of the case even in cases in which federal constitutional issues are involved. Under the full faith and credit clause, local doctrines of res judicata become a part of national jurisprudence and are, therefore, federal questions cognizable before the United States Supreme Court. *Durfee vs. Duke*, 375 U.S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963). The United States Supreme Court is the final arbiter of questions raised under the full faith and credit clause. *Johnson vs. Muelberger*, 340 U.S. 584,

95 L.Ed. 552, 71 S.Ct. 474 (1951).

Not all states adhere to the law of the case doctrine as Arkansas does, whether constitutional questions are involved or not. This is, therefore, an important question of federal law which should be settled by this Court.

In *Potter vs. Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986), the Arkansas Supreme Court reexamined the doctrine of the law of the case and decided to adhere to it. In a dissenting opinion, Justice Newbern said:

The changes taking place in the law of the case doctrine and cases from the jurisdictions which have departed from the totally inflexible approach are outlined in Annot., 87 A.L.R.2d 271 (1963), and its later cases supplement. While a long opinion could be written setting out the reasons given in modern cases for the exercise of some discretion in application of the law of the case doctrine, it need not be done here because the subject is treated comprehensively in A. Vestal, *Law of the Case: Single Suit Preclusion*, 1967 Utah L.Rev. 1. Additionally, I believe the facts of the case before us are sufficient to illustrate both sides of the issue. *Potter v. Potter* is a little

like *Jarndyce v. Jarndyce*. It seems to go on forever. As the majority opinion points out, one trial judge left the case because of his frustration with it. The temptation to opt for "finality over everything" is present. However, we should not let our frustration get the better of us to the extent we refuse to recognize our mistake and correct it. If the majority wishes to say our historical embrace of the law of the case doctrine is unyielding despite *Ferguson v. Green*, *supra*, I believe we should do as the Florida court in *Strazzulla v. Hendrick*, 177 So.2d 1 (Fla. 1965) and "expressly recede" from the doctrine to the extent it requires that we never correct in second appeals our errors in first appeals. See also *Greene v. Rothschild*, 68 Wash.2d 1, 5, 414 P.2d 1013 (1966), and *Union Light, Heat & Power Co. v. Blackwell's Administrator*, 291 S.W.2d 539 (Ky. 1956). As Professor Vestal said in the article cited above:

An examination of the recent cases involving the effect of an earlier appellate decision upon the same question before the same court at a later time suggests that the "law of the case" doctrine has lost most of its force. Appellate courts should decide

cases correctly; any other course would distort the law and treat litigants unfairly. It may be fair to say that the earlier decision is not binding, that "law of the case" does not apply, unless it is an exceptional case. Absent such exceptional circumstances, the appellate court should decide all legal questions correctly without regard to earlier decisions by the court. [1967 Utah L.Rev. at 15.].

This Petition for a Writ of Certiorari should be granted.

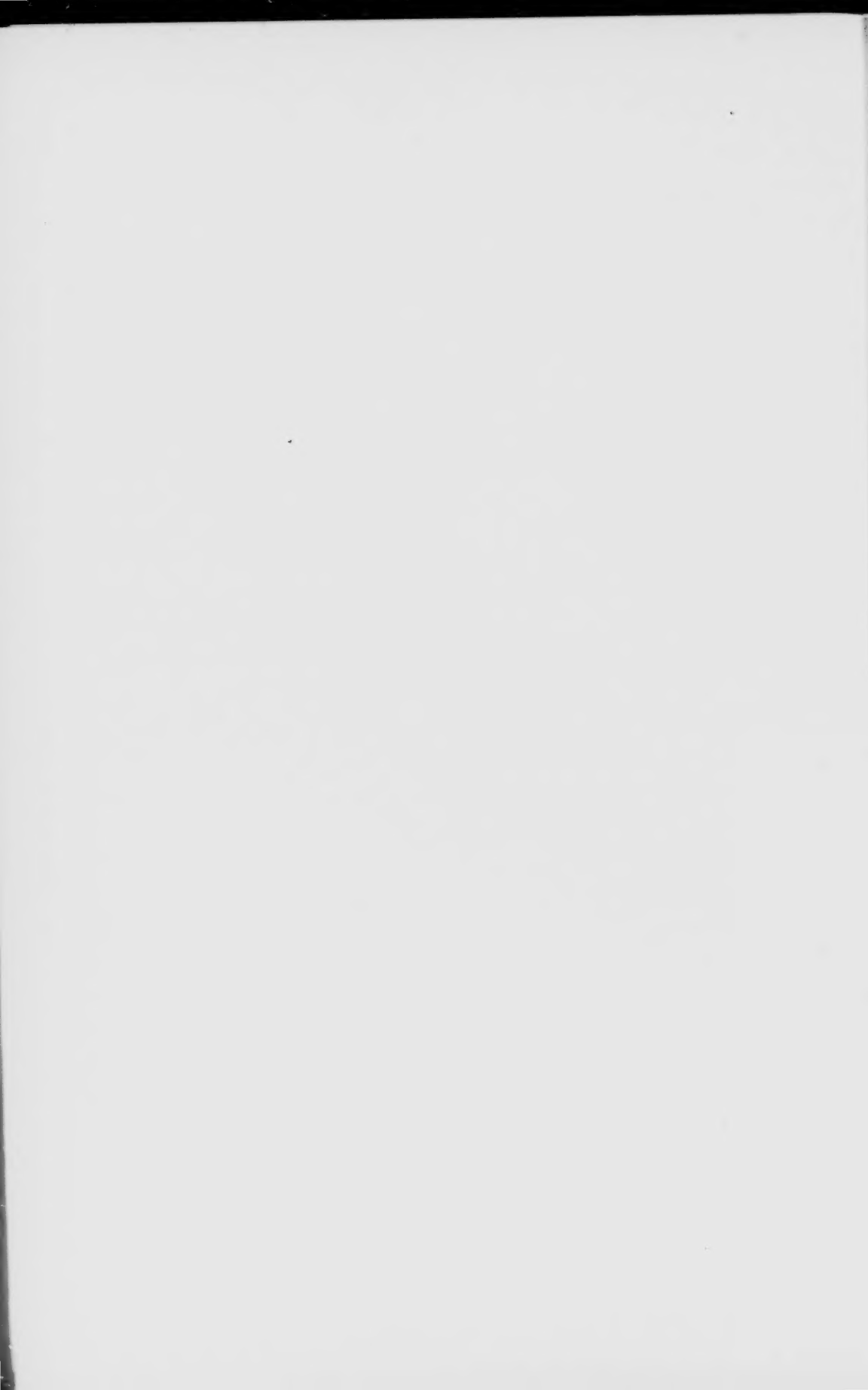
Respectfully submitted,

Charles Karr
MARTIN, VATER & KARR
Attorneys at Law
505 First National Bank Bldg.
Fort Smith, Arkansas 72901
Telephone: (501) 782-4028

Attorney for Petitioner



APPENDIX



APPENDIX A

285 Ark. 259

Harold Lee MORRIS, Appellant,

v.

John GARMON, Appellee.

No. 84—267.

Supreme Court of Arkansas.

March 18, 1985.

Rehearing Denied April 22, 1985.

HAYS, Justice.

By this appeal we are asked to reverse a probate court finding that Mrs. Alren Morrison was domiciled in Ft. Smith, Arkansas when she executed a will in November, 1979, and when she died in August, 1983. This dispute over a part of her estate is between her brother, the devisee under her will, and her son-in-law and two granddaughters, the appellees.

2 APPENDIX

Mrs. Morrison and her husband had lived in Ft. Smith for many years. After Mr. Morrison's death in 1975 she continued to live in the home until 1979, when she fell and broke her hip. When she was ready to leave the hospital her adopted daughter, Andrea Garmon, arranged for her to be moved to a Norman, Oklahoma, nursing home, near where Mrs. Garmon lived.

In September of that year Mrs. Garmon died from a recurrence of hepatitis. Some days later, Mrs. Morrison executed a will leaving her estate to John Garmon, expressing confidence that he would care for her two minor granddaughters, Kristin Garmon and Katherine Garmon. John Garmon and his daughters are the appellees. On Mr. Garmon's petition, Mrs. Morrison's assets were placed in a conservatorship. In October, 1979, Mrs. Morrison's brother, appellant Harold Morris, moved Mrs. Morrison to a nursing home in Ft. Worth.

In November or 1979, shortly after arriving in Ft. Worth, Mrs. Morrison executed a new will leaving everything to Harold Morris, or if he failed to survive her, to another brother, and if he failed to survive, to a niece. In August, 1983, Mrs. Morrison died in Ft. Worth.

Harold Morris offered the will for probate in

Tarrant County, Texas, and letters testamentary were issued. He then obtained an order in Oklahoma, directing the conservator to deliver the Oklahoma assets to him as executor.

In January, 1984, John Garmon petitioned the Sebastian Probate Court for letters of administration on the grounds that Mrs. Morrison was domiciled in Ft. Smith when she died and that her two granddaughters were pretermitted heirs under the Texas will. Harold Morris responded, alleging that Mrs. Morrison was a domiciliary of Ft. Worth. The probate judge found Mrs. Morrison to have been domiciled in Ft. Smith when she executed the second will and when she died, that the will should be construed according to Arkansas law, under which Mrs. Morrison's granddaughters were undisputably pretermitted heirs. The order directed Mr. Morris to deliver to the administrator the assets he was holding as executor.

Two points are presented on appeal: The Sebastian Probate Court erred in failing to give full faith and credit to the order of the Tarrant County Probate Court, admitting the will to probate in Texas, and the finding that Mrs. Morrison was domiciled in Ft. Smith is clearly erroneous.

4 APPENDIX

[1,2] The appellees maintain the full faith and credit argument was not presented to the probate judge, and the record bears out this contention. We find no mention of the argument in the proceeding below. The appellant introduced the will, the order of probate and other filings from the Texas and Oklahoma proceedings, but those documents were offered on the issue of domicile and do not impliedly express a full faith and credit argument not otherwise stated. Moreover, at the outset of the hearing below both sides informed the probate judge that the disputed issue was whether Mrs. Morrison was domiciled in Arkansas or in Texas when her will was made and when she died. We conclude the constitutional argument was not presented to the trial court and, hence, cannot be raised on appeal. *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983).

Appellant argues the issue of domicile is res judicata as that question was decided between these parties in connection with the Oklahoma proceedings. As with the full faith and credit issue, the point was not represented nor ruled on below.

[3] Appellant's argument fails in any case. The Arkansas court could properly address the

issue of domicile, as such a finding by a foreign court in a probate proceeding goes to jurisdiction and can be considered collaterally by a second state without a violation of the full faith and credit clause. See Leflar, *American Conflicts Law*, Pp. 411-412; Wills, 80 Am. Jur.2d § 1056, p. 185; *Matter of Will of Lamb*, 303 N.C. 452, 279 S.E.2d 781 (1981); *Burbank v. Ernst*, 232 U.S. 162, 34 S.Ct. 299, 58 L.Ed 511 (1914); *Re Clark's Estate*, 148 Cal. 108, 82 P. 760 (1905); *Smith v. Normart*, 51 Ariz. 134, 75 P.2d 38 (1983); *Scripps v. Durfee*, 131 Mich. 265, 90 N.W. 1061 (1902). And see *Phillips v. Sherrod Estate*, 248 Ark. 605, 453 S.W.2d 60 (1970).

[4,5] With respect to the second point, we cannot say the finding as to domicile was clearly erroneous. "To effect a change of residence or domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home." *Phillips v. Sherrod Estate*, *supra*; *Oakes v Oakes*, 219 Ark. 363, 242 S.W.2d 128 (1951) The intent to abandon one's domicile and take up another must be ascertained from all the facts and circumstances in any particular case. *Oakes v Oakes*, *supra*.

6 APPENDIX

Here, the decedent was a long time resident of Ft. Smith. After her fall there was no one to care for her in her home so she was moved to nursing homes, first to Oklahoma then to Texas. While in the Ft. Worth nursing home, she fell again, prolonging her convalescence in Ft. Worth.

After Mrs. Morrison was moved to Oklahoma, and thereafter in the Texas nursing home, her home in Ft. Smith was kept in a state of readiness for her return. None of the furniture was removed, utilities were kept on, her car was parked in the carport and the yard was regularly maintained, all with her knowledge and approval. She maintained her membership in the First United Methodist Church of Ft. Smith and on numerous occasions expressed to her grandchildren and to neighbors a steadfast hope of returning to her home in Ft. Smith—to be with friends, and to engage in normal activities. Although there was evidence of a contrary intent, we cannot say the finding of the probate judge was clearly erroneous. ARCP 52(a).

Our holding in *Oakes v Oakes*, *supra*, is instructive. Mrs. Oakes, an Arkansas domiciliary, developed tuberculosis and entered a sanitarium in New Mexico in 1947. She took only

her clothing, leaving her furniture and household goods in her home in Arkansas. Her two children went to live with grandparents in Texas. She returned to Arkansas three years later to testify in the divorce case she had filed against her husband. She told the court she planned to return to the sanitarium for an indefinite duration. We found no evidence that Mrs. Oakes had acquired a new domicile and added: "A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

Affirmed.

APPENDIX B

Harold Lee MORRIS, Appellant,

v.

John W. GARMON, Appellee.

No. 86—126.

Supreme Court of Arkansas.

January 20, 1987.

DUDLEY, Justice.

In the original appeal of this case, *Morris v. Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985), we affirmed the holding of the probate court that Alren Iris Morrison was domiciled in Fort Smith at the time of her death. That holding meant that Arkansas law governed the probate, descent and distribution of the estate, and that the decedent's grandchildren, who were pretermitted heirs of the predeceased child, inherited the estate. Following our decision, appellant Harold Morris, the decedent's brother, filed a

petition praying that the assets be transferred to him as an Independent Executor in Texas. The probate court denied appellant's request and ordered the Arkansas personal representative to make final distribution to the heirs and close the estate. We affirm.

[1] Appellant first argues that the trial court erred in refusing to strike appellee's response to his petition praying transfer of assets, and in refusing to grant the petition by default since the appellee did not respond to his petition within 10 days. See rule 2 (c) of the Unif. Rules of Circuit and Chancery Courts. Appellant is precluded from raising the point because he did not preserve the appealability of the order refusing to strike and denying default.

[2] Arkansas Stat. Ann. § 62—2016(a) and (b) (Repl. 1971) provides that all orders of a probate court are appealable except orders removing a fiduciary for failure to give a new bond or render an accounting, and orders appointing a special administrator. Section 62—2016(d) provides that in order to preserve the appealability of an intermediate probate order, the appellant must file a written objection to the order within sixty days from the date the order was rendered. The appealability of the intermediate order is then preserved and may be

appealed at the time of appeal of the final order. *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980). Here, the order, denying the motion to strike was filed on September 18, 1985, and no written objection was filed. The notice of appeal, after the final order, was given on March 12, 1986. Thus, the point was not preserved. However, even if the point had been preserved the probate judge had discretion in the matter, and she did not abuse that discretion by refusing to grant a default judgment on the merits which effectively would have been contra to our prior ruling.

[3,4] Appellant's next two points can best be discussed together. He argues that the probate court erred in failing to give full faith and credit to an order of the Texas probate court, and in failing to apply the doctrine of res judicata to an order of the Oklahoma district court. On second appeal, as in this case, the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *First American National Bank v. Booth*, 270 Ark. 702, 606 S.W.2d 70 (1980). The rule is founded upon a policy of avoiding piecemeal litigation. *First American National Bank, supra*.

In our first opinion, we wrote:

Two points are presented on appeal: the Sebastian Probate Court erred in failing to give full faith and credit to the order of the Tarrant County Probate Court, admitting the will to probate in Texas, and the finding that Mrs. Morrison was domiciled in Ft. Smith is clearly erroneous.

The appellees maintain the full faith and credit argument was not presented to the probate judge, and the record bears out this contention. . . . We conclude the constitutional argument was not presented to the trial court and hence, can not be raised on appeal.

Appellant argues the issue of domicile is res judicata as that question was decided between these parties in connection with the Oklahoma proceedings. As with the full faith and credit issue, the point was not presented nor ruled on below.

The above quoted paragraphs demonstrate that appellant's two points of appeal were

decided in the first appeal. The first decision became the law of the case and is conclusive.

[5] The final point asserted by appellant is that the probate court erred in failing to order the return of assets to him as the Independent Executor in Texas. The probate court was correct. Appellant has not presented any reason which would justify transferring the assets to Texas. Under Arkansas law, the two grandchildren of the decedent are pretermitted heirs and are entitled to inherit all of the assets of the estate. The probate court has ordered the Arkansas administrator to make final distribution and close the administration. Transferring the assets to Texas would serve no purpose whatsoever.

Affirmed.

